Blank Page

FILED
Office - Supreme Court, U. S.
SEP 9 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 66

(formerly No. 978)

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

W. E. CLARK,
Suite 802 Midland Savings Building,
Denver, Colorado,
FRED S. CALDWELL,
Suite 402 Midland Savings Building,
Denver, Colorado,
Counsel for Respondent.

Blank Page

SUBJECT INDEX

	Page
JURISDICTION	1
Constructive Service of Process as Authorized by Wyoming Compiled Statutes Does Not and Does Not Even Purport to Authorize the Rendition of a Judgment in Personam Based upon such Service	2
Colorado Supreme Court has not Limited the Ground or Basis of its Decision for Holding the Wyoming Court's Judgment Void as is Stated in Petitioners' Brief	11
The Wyoming Supreme Court's Observations and Holdings as to the Full Faith and Credit Clause of the Federal Constitution and Statutes	15

CASE INDEX

Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197	16
Bank of Chadron v. Anderson, 7 Wyo. 441, 53 Pac. 280	16
Cadle v. McLimans, 23 Wyo. 515, 153 Pac. 901-3	7

TEXT AND REFERENCE BOOKS

Black on Judgments, Vol. 2, 2d ed., Sec. 901	23

WYOMING COMPILED STATUTES, 1920

Section 4870	6–7
Section 4873	7
Section 5628, Actual Service	4
Section 5636, Constructive Service	4–6
Section 5641, Constructive Service	3

Blank Page

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 66

(formerly No. 978)

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

JURISDICTION

The Wyoming Court was without jurisdiction of either R. D. Meyer or his property which was at all the times herein refered to in the State of Colorado.

Respondent in her complaint in this action (R. 55) pleaded paragraph "Twenty-seventh," as follows:

> "Twenty-seventh:
>
> "That the judgment and decree of the District Court of Carbon County, Wyoming, was and is as to said R. D. Meyer, deceased, as a defendant, in said action in said Carbon County, Wyoming, Court absolutely void as having been rendered by said Court without jurisdiction of the person of said deceased and without jurisdiction of his property, which by its decree it assumed to impound, and does not even follow nor conform to, but contravenes the findings of the Court as set forth in said decree, and if said judgment be allowed to stand and be made effective as to said R. D. Meyer, it will cause plaintiff irreparable injury."

Respondent does not deem any additional Statement of Case necessary.

CONSTRUCTIVE SERVICE OF PROCESS AS AUTHORIZED BY WYOMING COMPILED STATUTES DOES NOT AND DOES NOT EVEN PURPORT TO AUTHORIZE THE RENDITION OF A JUDGMENT IN PERSONAM BASED UPON SUCH SERVICE.

Counsel for petitioners, in their brief, at page 6, present two questions and as to the first one submitted they fail to correctly state the basic facts upon which the Colorado Supreme Court based its decision and, therefore, say that the Colorado Court refused to give full faith and credit to a Wyoming judgment; whereas, the Colorado Supreme Court, as set forth in our original brief to which we refer and adhere, says that it did not consider the case from the standpoint of a Federal question being involved such as counsel have at all times attempted to inject into the case, but that its decision was and is one in *equity*, based upon

the facts which it has stated in its opinion and as set forth by respondents at pages 13 to 17, original brief.

They then ask:

> "Did the Wyoming Court have jurisdiction to render a judgment in personam upon the service of process in Denver, Colorado, on a defendant whose domicile was in the State of Wyoming?"

to which we answer no, though the question as to the domicile of the defendant, R. D. Meyer, in that action is one in dispute (R. 8) paragraph "Ninth" of the complaint.

At the same page, paragraph 3, they say:

> "A judgment in personam may be given by a Wyoming Court upon personal service of process outside of the State on a resident of Wyoming who has concealed himself to avoid the service of process,"

which is an assumption without support. They then cite certain cases and Restatement of The Laws of Conflict of Laws, Sections 77, 79, none of which, we respectfully submit, lend support to what they have said.

Section 5641 of the Compiled Statutes of Wyoming for 1920 is quoted in the Appendix in our previous brief and designated by the letter E, page 27, and reads:

> "In a case where service may be made by publication under the provisions of this Chapter, personal service of a copy of the summons and petition in said action may be made out of the state."
> * * *

The service secured in the Wyoming case upon the defendant Meyer was and is admittedly "constructive" (R. 9 and 46).

The subject matter of Chapter 359, Wyoming Compiled Statutes, 1920, is "Commencement of Actions—Service."

Embraced in said Chapter are Articles, I and II, the first of which pertains to "ACTUAL SERVICE" and is Section 5628 of said Statutes, reading as follows:

> "Sec. 5628. Service and Return of Summons. The service shall be by delivery at any time before the return day, a copy of the summons with the indorsements thereon, together with a copy of the petition to the defendant personally, or by leaving a copy of the summons and petition at his usual place of residence with some member of his family, or other person in his employ over the age of fourteen years, * * *"

Article II pertains to "CONSTRUCTIVE SERVICE" and is the following:

> "Sec. 636. Service by Publication. Service by publication may be had in either of the following cases:
>
> "1. In actions under the first three sections of the last preceding chapter, when the defendant resides out of the state, or his residence cannot be ascertained."

which said three sections are as follows:

> "1. For the recovery of real property, or of an estate or interest therein.
>
> "2. For the partition of real property.
>
> "3. For the sale of real property under a mortgage, lien or other incumbrance or charge."

> "2. In actions to establish or set aside a will, where the defendant resides out of the state, or his residence cannot be ascertained.

"3. In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defendant's place of residence is unknown, and in such actions against a corporation, incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by section 5631 and which has no place of doing business in this state.

"4. In actions which relate to, or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence cannot be ascertained.

"5. In actions against executors, administrators or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a non-resident of the state, or his place or residence cannot be ascertained.

"6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent.

"7. When a defendant in a petition in error has no attorney of record in this state, and is a non-resident of, and absent from the same, or has left the same to avoid the service of a summons in error, or so conceals himself that such process cannot be served upon him.

"8. In action or proceeding under Chapter 371, Wyoming Compiled Statutes, or to impeach a judgment or order for fraud, or to obtain an order of

satisfaction thereof, when a defendant is a non-resident of the state.

"9. In suits of divorce, for alimony, to affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a non-resident of the state or conceals himself or herself in order to avoid service of process.

"10. In all actions or proceedings which involve or relate to the waters, or right to appropriate the waters of the natural streams, springs, lakes or other collections of still water within the boundaries of the state, or which involve or relate to the priority of appropriations of such waters, including appeals from the determination of the state board of control, and in all actions or proceedings which involve or relate to the ownership of irrigating ditches situated wholly or partly within this state, when the defendant, or any of the defendants are non-residents of the state."

Designates the various kinds of actions wherein service of summons may be made by publication, and it will be observed that the coverage is of proceedings *in rem*, and said Section 5641 authorizing Personal Service Out of State specifically provides that service of a copy of the summons and the petition may be made *only in cases where publication of summons may be had.*

As further showing, as we contend, that said Section 5641, Wyoming Compiled Statutes, authorizing personal service of a copy of the petition and copy of the summons on a defendant outside the state does *not* authorize the rendition of a judgment in personam and does not even *purport* to authorize such a judgment to be rendered, see (R. 113) Mechanic's and Builder's Liens, Section 4870, Wyoming Compiled Statutes, 1920, the subject of which is "PARTIES TO ACTION—Constructive Service" (R. 114), which is the following:

> "In all suits under this chapter the parties to the controversy shall, and all persons interested in the matter in controversy, and in the property charged in the lien, may be made parties, but such as are not made parties shall not be bound by any such proceeding and constructive service may be had upon any defendant in suits brought under this chapter who may be non-residents of the state and cannot be personally served with the summons within the state in the same manner as constructive service is had in other cases at law."

We stress of the above section the concluding portion thereof, to-wit:

> "in the same manner as constructive service is had in other cases at law."

And then quoting from the Wyoming Compiled Statutes of 1920, Section 4873, the subject of which is "JUDGMENT ON CONSTRUCTIVE SERVICE," it reads as follows:

> "When the debtor has not been personally served with process according to law, but has been lawfully notified by publication, the judgment if for the plaintiff shall be that he recover the amount of indebtedness found to be due and the costs of suit to be levied out of the property charged with the lien therefor, which said property shall be specifically described in said judgment."

We respectfully submit that a complete answer to the statement of counsel is found in the case of Cadle, plaintiff in error, v. McLimans, defendant in error, by the Supreme Court of Wyoming, 23 Wyo. 515, 153 Pac. 901-3, a case wherein

> "plaintiff in error was made a defendant in the District Court, and in the petition relief was prayed against him, and by the order and judgment of the District Court he was required to forthwith pay into court a certain sum of money then in his possession,

and adjudged to pay his own costs in the case. That order and judgment he alleges was erroneous, and he seeks a reversal thereof * * *.

"The action in the district court is entitled 'Harry A. McLimans, plaintiff, v. Nettie Harmiston and S. P. Cadle, defendants.' The facts of the case, as we understand them from the record, are that on August 23, 1909, plaintiff purchased from one Bauman two lots upon which there was a mortgage in favor of defendant Harmiston for $200, which plaintiff assumed and agreed to pay, giving his note to her, which note contained the following statement: 'This note is given in lieu of a note heretofore given by J. A. Bauman and wife and secured by mortgage.' The Bauman note and mortgage were left in a bank, and afterwards by direction of Harmiston the claim was placed in the hands of defendant Cadle, who was and is an attorney at law. But whether he received the original note or only a copy of it from the bank does not clearly appear, nor is the evidence satisfactory as to what became of it, but tends to show that it was lost. It was long past due when plaintiff purchased the lots and gave his note for $200 to defendant Harmiston and which became due March 1, 1910. The deed to plaintiff for the lots was acknowledged before Cadle, and it appears that he retained possession of the mortgage and plaintiff's note, and on March 28, 1911, plaintiff paid to Cadle the amount due thereon ($230) and received his note, having written thereon, 'Paid in full Mch. 28, 1911,' and signed 'S. P. Cadle.' He also received from Cadle the mortgage and a copy of the Bauman note, each having written thereon and signed by defendant Cadle as attorney for Harmiston, a statement that they were fully paid and satisfied. It appears that Cadle was under the impression at the time that he as the attorney for Nettie Harmiston could cancel the mortgage by an entry on the margin of the record; but when he appeared for that purpose the clerk refused to allow him to do so without a power of attorney from the mortgagee. He informed plaintiff of that fact and endeavored to

secure a release from the mortgagee, but was then and ever since has been unable to locate her or to hear from her, and he still retains the money. Plaintiff testified that Cadle told him that he was attorney in fact for Mrs. Harmiston. That Cadle denied. Plaintiff also testified that at several times, when he inquired about it, Cadle told him he had not been able to locate Mrs. Harmiston. The relief sought against the defendant Harmiston, who was a nonresident of the state and was served by publication and made default, was to have the mortgage indebtedness decreed paid, the mortgage satisfied of record and to recover $100, the penalty provided by section 3696, Comp. Stat., 1910, for the failure of the mortgagee to cancel the mortgage of record. The relief sought against defendant Cadle, who appeared and filed his separate answer, will perhaps best appear by setting out a copy of the prayer of the petition," * * *

which we do not deem it necessary to quote, and the Court at the conclusion of the trial entered a decree canceling the mortgage, clearing plaintiff's title to the lots against defendant Harmiston and made and entered an order against defendant Cadle as follows:

" 'That defendant S. P. Cadle be and he is hereby ordered and directed forthwith to pay into the clerk of this court, of and from the moneys now in his possession belonging to defendant Nettie Harmiston, the sum of $100, which sum said clerk is directed to pay unto plaintiff or his attorneys of record, the same being the penalty for the failure of defendant Nettie Harmiston to release said mortgage of record within the time provided by law after the satisfaction thereof,' and adjudged each party to pay his own costs. From the order and judgment against defendant Cadle, he appeals.

"Cadle's authority as attorney for defendant Harmiston to collect and receive the money is fully sustained by the evidence, and such payment to him extinguished the debt secured by the mortgage, and

the decree canceling the mortgage was properly entered and is not here complained of. But upon what theory Cadle could rightly be made a party defendant in that action, or upon what principle or rule of procedure he could be legally ordered to pay over money in his possession belonging to defendant Harmiston we are unable to see. If plaintiff had a claim against her for money and Cadle was her debtor, or had money belonging to her in his possion, the statute on attachment and garnishment provides a clear and ample method to reach it; but that method is not by making the debtor of the defendant, or person having money or property of defendant in his possession a party defendant in the action. The court in connection with the relief to cancel the mortgage could make no valid order disposing of defendant Harmiston's money in Cadle's possession until it acquired control over it by attachment, which was not done in this case; and the order so made was erroneous. No personal money judgment could be rendered against defendant Harmiston who was served by publication only, nor was such a judgment rendered against her. Aside from the action against defendant Harmiston to cancel the mortgage of record, the case seems to bear some resemblance to the incident recorded in the Gospel according to John, chapter [redacted] verse 3, and must have a similar result as in that instance."

(Said verse 3 is the following: "Simon Peter saith unto them, 'I go afishing.' They say unto him, 'We also go with thee.' They went forth and entered into a ship immediately; and that night they caught nothing.")

"The judgment of the district court in so far as it affects defendant Cadle is reversed and the cause remanded, with directions to vacate the order and judgment against him, and to enter an order dismissing the action as to him at plaintiff's cost.

"Reversed and remanded, with directions."

It is because of what the Wyoming Supreme Court has said in the foregoing case, as to the necessity for bringing the Harmiston money within the Court's jurisdiction and under its control by attachment or garnishment; its saying that the trial court was without authority to have rendered a money judgment against Mrs. Harmiston (which it did not, however, assume to do), *because the service upon her was by publication only, and that no procedural attempt even had been made in an endeavor to bring the money within the Court's jurisdiction or under its control, just as in the case at bar, though it was at all times in the possession of Cadle who had been sued and was before the Court, that we are so insistent* that the Wyoming judgment in the case at bar is *void and a nullity* as to the property of Meyer which was at all times in Colorado and not within the jurisdiction of the Wyoming Court and that he, Meyer, having been *constructively* served, with a copy of the petition and a copy of the summons, in the City and County of Denver, Colorado, was in effect and in fact served *only as though by publication.*

It is elementary and needs no citation of authorities that the res must be in the state where the Court is sitting or by proper procedural or remedial process brought into the jurisdiction of the Court and under its control, or otherwise the Court is conclusively without jurisdiction thereof.

COLORADO SUPREME COURT HAS NOT LIMITED THE GROUND OR BASIS OF ITS DECISION FOR HOLDING THE WYOMING COURT'S JUDGMENT VOID AS IS STATED IN PETITIONERS' BRIEF.

The brief of petitioners in support of their application for a Writ of Certiorari, at pages 28-29 under their subdivision "b," says:

"The Colorado Supreme Court held void the Wyoming judgment solely upon the ground that after the Court found that Milliken had assigned to the Transcontinental Company his claim against Meyer in the agreement of May 3, 1924, it could not then enter judgment upon the claim in favor of Milliken (R. 232). It must be remembered that the assignee of the claim, Transcontinental Oil Company, was before the Wyoming Court and had pleaded this contract in defense of the cause of action asserted against it by Milliken. The attorneys for the Transcontinental Company approved the form of the Wyoming judgment (R. 39). One of the petitioners herein, The Ohio Oil Company, pleaded in this cause, as a third defense and as a cross-complaint against the Millikens, the aforesaid agreement of May 3, 1934 (R. 83). It thus appears that the assignee of Milliken was a party to the Wyoming case and did not object to the entry of the judgment against Meyer upon the assigned claim. Likewise the successors in interest of such assignee were parties to this cause and one of them has specifically pleaded the May 3, 1924, agreement (R. 95). Meyer may not defeat the claim of Milliken by relying upon the assignment when both the assignor and the assignee were parties to the litigation and make no objection to the judgment in favor of the assignor upon the assigned claim."

We have the impression that the pleadings in a case are the things which advise the Court as well as counsel for the opposing party or parties just what is in controversy and being litigated in the case; and there are no pleadings in the case at bar that by any stretch of the imagination can be said to justify such construction as counsel for petitioners contend for.

They say in attempted justification that

"The attorneys for the Transcontinal Oil Company approved the form of the Wyoming judgment (R. 39)."

Those attorneys did *not* represent Mr. Meyer, but *did* represent Transcontinental Oil Company the alleged joint tort feasor in the Wyoming action and what they said or did is not binding on Mr. Meyer or his successor in interest, the Respondent herein.

In their said statement and at page 29 thereof, they make reference to the pleading (cross-complaint) of the petitioner, The Ohio Oil Company (R. 83), which (R. 82-85), folios 450-455, it is our pleasure to quote and is the following:

> "That on the 3rd day of May, 1924, in order to settle all controversies with said William B. Milliken, said Transcontinental Oil Company assigned to William B. Milliken, who received and accepted the same, a 1/32nd interest in the net profits from oil and gas operations on said 'Moffat Pool' and at the same time and as a part of the same transaction the said William B. Milliken together with one Carl S. Milliken, entered into an agreement with said Transcontinental Oil Company of Colorado, which agreement recites that said William B. Milliken and Carl S. Milliken assert and maintain that they are entitled to, and are the owners of an undivided 2/3rds interest in a certain 1/16ths of the net profits which may be derived from oil and gas operations and development which may be conducted upon the properties, permits or leases procured by R. D. Meyer and assigned to said Transcontinental Oil Company, under a contract dated August 31, 1922, which said last mentioned contract is set forth in paragraph Third of plaintiff's complaint herein between said R. D. Meyer and said Transcontinental Oil Company; that by said agreement of May 3, 1924, said William B. Milliken and Carl S. Milliken jointly and severally sold, assigned and transferred to said Transcontinental Oil Company all and singular their right, interest, claim and demand of every kind or nature as against the said R. D. Meyer in anywise pertaining to any and all lands in Moffat, Routt and Rio Blanco Counties, Colorado, or the 1/16th interest

in said net profits and the rights of said R. D. Meyer therein; that said 1/16th interest included the 1/64th interest now in dispute; that by reason of having assigned and transferred all his right, title and interest in said 1/16th interest in and to said net profits as aforesaid, said defendant William B. Milliken—and Margaret M. Milliken, as his assignee—were thereafter estopped to make any claims against this defendant as to said 1/64th interest of the net profits from production from said 'Moffat Pool' and were not then, or thereafter, and are not now entitled to any part of the 1/64th interest in said net profits so retained by this defendant in a special fund or account as aforesaid; that the payments so made by this defendant to said Margaret M. Milliken, as hereinabove set forth, covering the 1/64th interest of said net profits were made by mistake of fact to the wrong person without any consideration moving from said Margaret M. Milliken or William B. Milliken and because of forgetfulness of said agreement of May 3, 1924, and when nothing was due or owing to said Margaret M. Milliken or William B. Milliken under any contract between them or either of them and said Transcontinental Oil Company or this defendant; that the same constituted an unjust enrichment of Margaret M. Milliken and William B. Milliken and in equity and good conscience the same should be repaid by said Margaret M. Milliken and William B. Milliken to this defendant, together with legal interest thereon from the respective dates of said payments.

V.

"That on or about the 29th day of November, 1935, this defendant demanded of defendants Margaret M. Milliken and William B. Milliken that said sums of money so paid to Margaret M. Milliken be repaid to this defendant, The Ohio Oil Company.

VI.

"That neither of said defendants, Margaret M. Milliken nor William B. Milliken, has repaid to this defendant the said money, nor any part thereof."

In said statement they also refer to the agreement of May 3, 1924 (R. 95), which is the following together with this allegation, "and said 1/64th was at no time owned by or subject to assignment by William B. Milliken and Carl S. Milliken or either of them, to said Transcontinental Oil Company."

(R. 95), "NOW, THEREFORE, for and in consideration of the sum of Ten (10.00) dollars and other good and valuable considerations passing from the said second party to the said first parties, and the receipt of which is hereby acknowledged, the said first parties and each of them jointly and severally, have sold, assigned and transferred and do hereby sell, assign and transfer unto the said party of the second part, all and singular their right, interest, claim and demand, of every kind or nature, as against the said R. D. Meyer in anywise pertaining to any and all lands in Moffat, Routt and Rio Blanco counties, Colorado, or the one-sixteenth (1/16) interest in said net profits, and the rights of said R. D. Meyer therein; and said 1/64th was at no time owned by or subject to assignment by William B. Milliken and Carl S. Milliken, or either of them, to said Transcontinental Oil Company."

And said assignment, among other things, shows that the property involved in this litigation was *not* within the jurisdiction of the Wyoming Court but was and is in the State of Colorado and *without* the Wyoming Court's jurisdiction, which is *also* disclosed by Respondent's Ex. "R" (R. 159).

THE WYOMING SUPREME COURT'S OBSERVATIONS AND HOLDINGS AS TO THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION AND STATUTES.

We ask attention to a Wyoming Supreme Court case which was brought based upon a judgment secured in a

Nebraska County Court, and is one wherein counsel for plaintiff in error relied almost wholly, as is said, upon the "full faith and credit" clause of the United States Constitution and Statutes.

We deem the expressions of the Wyoming Supreme Court of much importance in view of the fact that petitioners' contention in the case at bar is that full faith and credit was not given by the Colorado Supreme Court to the Wyoming District Court judgment.

The case to which we refer is Bank of Chadron v. Anderson, which was twice in the Supreme Court of Wyoming—first reported in 6 Wyo. p. 518, 48 Pac. 197; and on the occasion of its second visit to that Court the proceedings are reported in 7 Wyo. p. 441, 53 Pac. 280, and it is from the Pacific reports we shall quote.

We shall undertake to read from these Pacific reports only such matters as are pertinent to the issues in the case at bar as there is much concerning records and pleadings discussed which is not pertinent to the case at bar.

As the syllabus is by the Court pursuant to authority of Wyoming Statutes, it will be observed that we are within our rights in reading from the syllabi and 4. thereof is the following:

> "4. A judgment of a sister state, when sued on in this state, may be impeached for want of jurisdiction of the person; and fraud in its procurement may be interposed as a defense thereto if such defense would have been permissable in a suit upon the judgment in the state where it was rendered. Such defense may be interposed in a suit upon a judgment rendered by a county court in the state of Nebraska."

6. of the syllabi reads:

"6. The fact that the Nebraska judgment was rendered for a greater sum than was endorsed upon the summons, and in excess of the amount which was actually due, was at least competent, in connection with all other circumstances, upon the issue of fraud in the procurement of such judgment."

"7. *Held*, that the evidence is sufficient to support the finding of the court that there existed a valid defense to the former action, the judgment wherein was sought to be vacated."

"9. Shortly after the execution and delivery of certain promissory notes, suit was brought by the maker in the District Court of Dawes County, Neb., against the payees and the one claiming to hold them as collateral security for an antecedent debt of the payees, to obtain the cancellation of the notes and enjoin their collection. Pending that suit the said alleged holder commenced an action upon the notes in the county court of the same county, without making any reference to the pending suit in the pleadings, and obtained a judgment by default. Subsequently a final decree was rendered in the suit in the district court, perpetually enjoining the original payees from transferring or collecting the notes, and enjoining the party claiming to hold them as aforesaid from transferring or collecting the same except to the extent of its interests acquired prior to the commencement of such injunction suit. *Held* that, as between the two judgments, the decree in the district court must prevail, as that court first acquired jurisdiction of the subject-matter and the parties, and, in a suit in this state upon the county court judgment, it is permissable for the defendant, in such suit to show that at the commencement of the suit in the district court aforesaid the alleged holder of the notes had not acquired any interest in the notes, and that, if no such interest had been acquired, that fact would constitute a valid defense to the judgment of the county court."

Following the filing of pleadings and the case being at issue, trial was had, and beginning in the ninth line from the bottom of page 198, left hand column, it is said:

> "* * * the court found that the plaintiff, Anderson, had a good and valid defense to said action; that the judgment was procured by said bank in a much greater sum than was due, by imposition, through its attorneys, both on the court and the defendant therein; and that said judgment was procured by undue means on the part of the bank against Anderson. It was thereupon ordered that said judgment be vacated and set aside, and that the action wherein it had been rendered to be placed upon the trial docket of said court, and stand for trial at the next regular term."

That is the occasion for another trial and a second appearance of that case in the Wyoming Supreme Court as previously suggested.

One of the contentions of petitioners in the case at bar is that the judgment of the Wyoming Court cannot be "collaterally attacked" and it is and at all times has been our insistence that the action instituted by Respondent to have the Wyoming Court judgment decreed to be void and a nullity, is not a collateral attack but a *direct* one.

The Wyoming Supreme Court says, reading from the left hand column, at page 200 of 48 Pac., beginning in line eleven:

> "The ground of the contention on the part of plaintiff in error seems to be that, inasmuch as the judgment of the Dawes county court in Nebraska is the foundation of the original suit in this state, that judgment cannot be impeached collaterally."

and then reading in the same column, beginning in line 17 from the bottom, the Court says:

"With reference to the collateral attack upon the judgment of the county court of Dawes County, Neb., the petition charges want of jurisdiction of the person, and that can always be questioned in a suit upon a judgment of a sister state. There has been much discussion in the courts of the United States and of the various states respecting the right to impeach such judgments for fraud in their procurement, by reason of the provisions of the constitution and statutes of the United States respecting the faith and credit to be given by each state to the public acts, records, and the judicial proceedings in the courts of other states; but the general trend of authority, and the great weight thereof, are in favor of allowing such a defense if it would have been permissable in a suit upon the judgment in the state where it was rendered; and such is the rule adopted in Nebraska. Eaton v. Hasty, 6 Neb. 419; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306."

and it appears from the decision from which we have been reading that the same rule prevails in Wyoming and that an endeavor to get all the facts justifies the extent to which the Colorado Supreme Court has gone in analyzing the decree of the Wyoming Court in the case at bar, as is disclosed in its opinion, and in particular the four pages of that opinion set out in our original brief herein opposing the application of petitioners for a Writ of Certiorari, by which brief we still stand and the law as therein set forth we continue to contend for as being the law applicable to the case at bar.

Reading further from the opinion and at page 201 of 48 Pac., left hand column, and beginning in line 3 from the top of the page, it is said:

"* * * Nevertheless, upon an inspection of the evidence, we are of the opinion that it is sufficient to support the finding of the court that the plaintiff had a valid defense to the former action, the judgment wherein was sought to be vacated. The evi-

dence tends at least to show that fraud had been practiced in procuring the Nebraska judgment upon the notes. An affirmance of the judgment of the district court in the present cause will result in a new trail of the former action, upon which trial the evidence already adduced will be again used, and must then receive consideration. We do not deem it advisable to discuss the same in detail, nor at all in respect to a mere question of fact. In respect, however, to the effect of the judgment of the district court of Dawes County, Neb., upon the judgment of the county court of the same county, it is proper that we express our views.

"The impregnable character of the county court judgment, when sued on in this state, is strongly urged upon our attention, and counsel for plaintiff in error rests his case almost entirely upon the proposition that such judgment must be accepted without question in the courts of this state. We are inclined to the opinion that the evidence shows jurisdiction of the subject-matter and of the person of Anderson in that Court, but its judgment may nevertheless be impeached for fraud; and we are inclined to view the various irregularities connected with the exercise of its jurisdiction in that court as matters affecting the charge of fraud, rather than as being jurisdictional matters. There is, however, another Nebraska judgment in this case, to which the same faith and credit must be given as to the one upon which plaintiff in error relies. The record of the decree of the district court enjoining the collection or transfer of the notes does not show the date when it was rendered, except by a filing mark of the clerk, nor the date when the suit was commenced; but Mr. Fisher, counsel for plaintiff in error, and a party to the suit in the district court, was a witness upon the trial of this case, and testified that the injunction suit was commenced on or about July 20, 1888, and that the decree was rendered June 23, 1892; and, as to the date of the decree, the filing mark upon the back of the copy of the decree brought into the record agrees

with the statement of the witness. The suit in the county court upon the notes was commenced in August, 1891, and judgment was rendered therein on the 8th day of March, 1892. The subject of the suit in the district court was the same notes upon which suit was brought in the county court, but in the former the cancellation of the notes and an injunction against their collection and transfer was sought; and in the latter the defendants in the former—one of them as party, the other as attorney—sought judgment upon the notes. In the former suit, which was not concluded by final decree until June, 1892, the original payees were enjoined from transferring or collecting any of said notes, and the bank was enjoined from transferring and collecting them, excepting as to such interest as it may have acquired prior to the commencement of that suit. It is conceded that the basis of the judgment in the county court was the notes the collection of which was sought to be enjoined in the suit in the district court, and which was so enjoined to the extent aforesaid by a decree subsequent to the judgment of the county court. In the suit upon this last-mentioned judgment in the courts of our state, seeking thereby to collect said notes, although they may have merged in a judgment, the injunction decree may be interposed as a defense." * * *

We read now from the right hand column, same page, beginning at line eleven from the bottom of said page where it is said:

"* * * Taking the two judgments together, then, the question becomes an open one for consideration, whether the bank had any interest in the notes prior to the commencement of the injunction suit. If the notes were not indorsed at the time its cashier and manager had notice of the facts, the bank had not then any interest as against the defense of want of consideration, and could not thereafter acquire any. It was by the decree of a competent court perpetually enjoined from collecting such notes, except as to such interest as it had acquired prior to

the injunction suit. The absence of any such interest may be shown in the suit in the district court of Weston county brought upon the judgment; the injunction affecting its collection, as well as the notes upon which it was founded. Otherwise the courts of this state would be giving full faith and credit to one judgment of another state, and denying the same to another judgment of the same state concerning the same subject-matter," * * *

"The judgment is affirmed."

We now read from the second opinion of the Wyoming Supreme Court in the case of Bank of Chadron v. Anderson and from the Pacific citation, and we read at page 281, right hand column of 53 Pacific, beginning with the word "summarized" about the middle of the column where it is said:

"* * * Summarized, the findings of the trial court are: First, that the county court of Dawes County, Neb., had jurisdiction over the person of the defendant, and of the subject-matter of the controversy; second, that the judgment sued on was rendered for $161 in excess of the amount of notes and interest, and that such excess was fraudulently caused to be added to the judgment by plaintiff's counsel in that action, and, generally, that the judgment was procured by fraud on the part of the plaintiff and its counsel; third, that the notes were not purchased by plaintiff in good faith, or for a valuable consideration, and without notice of the defense of Anderson thereto; fourth, that the notes were not indorsed by the payees until after plaintiff had been fully advised by Anderson that they had been procured by fraud and were fraudulent, and that he had a valid defense thereto; and, fifth, that plaintiff had not at any time any legal or valid interest in, or title to, the notes, as against the maker thereof, and was not, and is not, entitled to recover any amount whatever from the defendant Anderson upon the notes, or the judgment of the county court,

nor under the terms of the decree rendered by the district court of said Dawes County, Neb. The point insisted on is that, as the court found the county court to have possessed jurisdiction over the person of defendant and the subject-matter of the action, none of the other facts found are sufficient to impeach the judgment rendered by that court, and sued upon in the present action. We held when the case was here before that the judgment could be impeached for fraud in its procurement. That question was fully discussed in the opinion then filed, and we adhere to the views therein expressed. The trial court found that the judgment was procured by fraud, and having so concluded, found from the evidence that the notes themselves were fraudulently obtained, and that the plaintiff was not an innocent holder thereof, for value, without notice. If the judgment was fraudulently obtained, then every defense which the maker of the notes had as against the bank might properly be shown upon the trial. * * * We are therefore unable to assent to the proposition that the judgment is improper, as based upon the findings. If the findings are correct,—and, for the reasons already stated, we must assume them to be so,—the appropriate judgment was rendered."

"Affirmed."

Counsel, at page 20 of their brief, in discussing the "full faith and credit" clause, state, near the bottom of said page, that

> "It is also well settled that notwithstanding the full faith and credit provision of the United States Constitution it may be shown in a collateral proceeding that the court in any state which renders a judgment did not have jurisdiction."

and in the Appendix to our brief filed in opposition, we cite "H," page 28, Black on Judgments, Vol. 2, 2d ed., Sec. 901, where it says in particular:

> "It is fair to infer that the constitution mean no more than that full faith and credit shall b given to the valid and lawful judgments of th courts of a sister state."

which, we respectfully submit, is a *reasonable* construc tion, but it is and has at all times been the position of Re spondent and her attorneys that the Wyoming judgmen concerning which we complain, *is neither valid nor lawfu*

We respectfully submit that the Writ of Certiora should be dismissed.

W. E. CLARK,
FRED S. CALDWELL,
Attorneys for Responden

Blank Pag